(31)

In the Supreme Court of the United States

OCTOBER TERM, 1943.

No. 92.

THE SWAN CARBURETOR COMPANY,
Petitioner,

vs.

THE NASH MOTORS COMPANY,
Respondent.

PETITIONER'S MOTION TO SUPPLEMENT AND AMEND THE PETITION FOR CERTIORARI.

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Now comes The Swan Carburetor Company, the petitioner in the above entitled cause, and moves this Honorable Court to supplement and amend its Petition for Writ of Certiorari filed herein. Petitioner prays leave to supplement and amend its Petition for Writ of Certiorari in the following particulars:

1. To include a review of what appears to petitioner to be errors in the Court's finding of non-infringement in the judgment of the Circuit Court of Appeals for the Fourth Circuit as set forth in the Amendment to Mandate, November 2, 1939, Record Vol. II, page 19, as follows:

> "On consideration whereof, it is now here ordered, adjudged and decreed by this court that the decree of the District Court in this cause be and the same is hereby reversed with costs as to the finding of infringement of claim 20 of patent No. 1,536,044 by defendant's manufacture, use and sale of its manifold illustrated in part and exemplified in plaintiff's exhibits 32 to 36, inclusive, and that this cause be, and the same is hereby remanded to the District Court of the United States for the District of Maryland, at Baltimore, for further proceedings in accordance with the opinion of the court filed herein."

FOREWORD.

The Bill of Complaint herein alleges infringement of Patent No. 1,536,044 by defendant's manufacture, use and sale of intake manifolds for automobile engines, and encompasses manifolds in suit in the case of *The Swan Carburetor Company v. Reeke-Nash Motors Company,* a suit filed in the Sixth Circuit and is reported in 88 Fed. (2) 876. These manifolds have come to be known here as the first group manifolds. The defendant assumed the defense of that suit and a *res judicata* has been conceded by defendant in its answer herein (25 F. S. 22, 23). The Bill of Complaint also alleges the infringement by defendants, through manifolds made since the filing of the suit against the Reeke-Nash Company. The infringement of Claim 20 of Patent No. 1,536,044 was charged as to these later manifolds, and have become known here as the "Nash second group manifolds" or the accused manifolds in the litigation. The second group manifolds are set forth in the Amendment to Mandate quoted above as Plaintiff's Exhibits 32 and 36.

The opinion of the Circuit Court of Appeals for the Fourth Circuit is reported in 105 Fed. (2) 305 and is found in the Record, Volume II, pages 3-12 and the dissenting opinion of Judge Parker appears in 105 Fed. (2), page 310 and is found in the Record, Volume II, pages 13-15.

THE REASON RELIED UPON FOR THE ALLOWANCE OF THE SUPPLEMENT AND AMENDMENT.

There is a diversity of decision between the majority of the Court of the Appeals for the Fourth Circuit on the one hand, and the Court of Appeals in the Sixth Circuit, the jury and other courts in the Sixth Circuit, Judge Parker of the Court of Appeals for the Fourth Circuit and the District Court for the District of Maryland. The diversity is clear from the following statement by Judge Parker in

his dissenting opinion, 105 Fed. (2) 311, Record, Volume II, page 12, as follows:

> "Finding of non-infringement is in direct conflict with a finding in one of the last General Motors cases affirmed by the Sixth Circuit, 88 Fed. (2) 876."

This diversity relates to a single question of infringement of Claim 20 of the Swan Patent No. 1,536,044 and what is known as the Nash Second Group Manifolds or the accused manifold in the litigation. The District Court held there was infringement by the second group manifolds (Record, Vol. II, page 1). Similar manifolds manufactured by the General Motors Corporation were held to be infringements of the patent in suit (88 Fed. (2) 876, C. C. A. 6).

MEMORANDUM.

Perhaps this petition is unnecessary in the view of the practice in this Court to consider and review questions not specifically mentioned in a Petition for Certiorari. *Panama v. Napier,* 166 U. S. 280, 284; *Hamilton v. Wolf,* 240 U. S. 251, 258; *Chicago-Northwestern v. Durham,* 265 U. S. 580; *Simmons v. Grier,* 258 U. S. 82; *Toledo v. Computing Scale,* 261 U. S. 399, 418.

In *Panama v. Napier,* 166 U. S. 280, Mr. Justice Brown said in the opinion at page 284:

> "But while the court of appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination."

In this case the lower court confined its review to the subject matter of the second appeal, namely damages and profits, however, as this Court said, "no such limitation applies to this Court."

If however the Court should deem that this petition is necessary to review this point, amendments and supplements to petitions for certiorari have been granted in some of the state courts, notable among these is New York (14 *C. J. S.* 222).

The error complained of here was contained in the interlocutory judgment of the lower court and petitioner did not make application to this Court for a Writ of Certiorari when this interlocutory decree was entered. The court has approved the practice of waiting until the final judgment before making application for a Writ of Certiorari to review the judgment in a number of cases.

In *Panama v. Napier,* 166 U. S. 280, this Court said on page 284:

> "If, under such circumstances, this court were powerless to examine the whole case upon certiorari, we should then be compelled to issue it before final decree, whereas, as was recently said in the case of *The Conqueror* (ante 514), it is and generally should be issued only after a final decree."

In *Hamilton v. Wolf,* 240 U. S. 250, a trade mark case, this Court said on page 258:

> "And, although in this instance the interlocutory decision may have been treated as settling 'the law of the case' so as to furnish the rule for the guidance of the referee, the District Court, and the Court of Appeals itself upon the second appeal, this court, in now reviewing the final decree by virtue of the writ of certiorari, is called upon to notice and rectify any error that may have occurred in the interlocutory proceedings."

This Court in *Simmons v. Grier,* 258 U. S. 80 has held that the failure to apply for a Writ of Certiorari to an interlocutory decree is not laches. At page 91 this Court said:

> "We cannot assent to the view of the court below that plaintiffs may be regarded as consenting to the decree of January 5, 1916; they simply accepted an adverse

decision as to a part of their suit, not open to further appeal at their instance, and proceeded in the orderly mode to pursue their suit as to the rest. They were not guilty of laches for omitting at that stage to make application to this court for allowance of a writ of certiorari."

In respondent's brief on our presently pending petition for certiorari, page 11, respondent suggests that the review not be confined to the single point presented in the petition and the petitioner acquiesced in this to the extent of the one additional point here presented for the reasons stated.

Our reasons for taking up the case on this point—which we here call for convenience, the second point,—are stated fully under the title "Respondent's Second Group Manifolds" at pages 13 to 20 of our reply brief on the application for writ of certiorari and we will not repeat them here.

Respectfully submitted,

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